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IN THE

# Supreme Court of the United States

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October Term, 1973
No. 73-970

DERICKSEN M. BRINKERHOFF and the MEMBERS OF THE CLASS, *Petitioners,*

*vs.*

AMFAC, INC., *Respondent.*

**Brief of Respondent, Amfac, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Request of Amfac, Inc. for Damages.**

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*Respondent.*

**Brief of Respondent, Amfac, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Request of Amfac, Inc. for Damages.**

Respondent, Amfac, Inc., respectfully submits the following brief in opposition to the Petition of Dericksen M. Brinkerhoff and the members of the class for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and prays that said Petition forthwith be denied and that Respondent be awarded damages pursuant to the provisions of Rule 56(4) of the Revised Rules of this Court.

## I.
## Opinions Below.

The *per curiam* opinion of the Court of Appeals entered on September 13, 1973 [Petitioners' Appendix (hereinafter "Pet. App."), pp. A1-A2], is reported at 485 F.2d 1389 (9th Cir. 1973).

## II.

## Introduction.

The Petition for Writ of Certiorari seeks review of a summary affirmance by the United States Court of Appeals for the Ninth Circuit of a nonappealable decision of the United States District Court for the District of Hawaii, which held that the court-appointed and supervised appraisers had properly determined the exchange value of the capital stock of three Hawaiian sugar plantation companies. That petitioners seek such a review is a direct reflection on their lack of candor in light of their apparent deliberate omission of an express written stipulation that:

> "The appraisals, prepared by the investment banker shall be final, conclusive, and binding on the parties, *and no appeal or review shall lie therefrom.*" [Emphasis added] [XV C.T. 4802-4803].[1]

Respondent respectfully contends that the Court must hold petitioners to their agreement (under which they have received over $400,000 in fees and costs from respondent) by denying the Petition for Writ of Certiorari.

## III.

## Counterstatement of the Case.

### A. The Circumstances Preceding and Surrounding the Execution of the Stipulation of Settlement Require Denial of the Petition.

This action arose out of the merger of the Lihue Plantation Co., Ltd. ("Lihue"), Puna Sugar Co., Ltd.

[1]All references to ".... C.T. ...." refer to the particular volume and page number of the Clerk's Transcript on Appeal. All references to "R.T. .... (date)" refer to particular portions of the Reporter's Transcript of the proceedings held before the District Court.

("Puna") and Kekaha Sugar Co., Ltd. ("Kekaha") (collectively referred to as "the Plantations") into respondent, Amfac, Inc. ("Amfac"), a publicly-owned corporation. Prior to the mergers, Amfac owned or controlled over 75% of the issued and outstanding stock of each of the Plantations and could have consummated the proposed mergers without proxy solicitations [XIII C.T. 4046]. Nevertheless, proxies were solicited and in October of 1968 each of the mergers were approved by an overwhelming vote of the Plantations' shareholders. The mergers were completed in January of 1969 with the exchange of Plantation shares for Amfac shares, the exchange ratios having been based upon appraisals performed by Dean Witter & Co.

On May 14, 1969, petitioners, and another entity which was abandoned this litigation, filed this class and derivative action alleging that because of undisclosed relationships between Dean Witter & Co. and Amfac, the Dean Witter & Co. appraisals prepared for the merger were improper, that improper and inaccurate representations had been made to the Plantation shareholders to induce approval of the mergers and that by such acts a fraud had been perpetrated upon the minority Plantation shareholders under various provisions of the Securities Exchange Act of 1934 [I C.T. 3]. Thereafter, petitioners' motion to maintain the action as a class and derivative action was granted [XI C.T. 3458]. *Northern Acceptance Trust 1065 v. Amfac, Inc.*, 51 F.R.D. 487 (D. Hawaii 1971).

On May 5, 1971, petitioners' motion for partial summary judgment, as to liability only under Section 10(b) of the Securities Exchange Act of 1934, was granted as to certain defendants [XIV C.T. 4338; R.T. 5-8

(May 5, 1971].[2] On May 17, 1971, the District Court denied defendants' motion for certification of an interlocutory appeal from its decision [R.T. 26-27 (May 17, 1971)], leaving respondent the right to appeal after trial of the case.[3]

On August 2, 1971, following arduous and extensive settlement negotiations between counsel for petitioners and counsel for Amfac, a Stipulation of Settlement ("Stipulation") was drafted and lodged [XV C.T. 4799] together with a motion for approval of same [XV C.T. 4794]. A copy of that Stipulation is attached hereto as Appendix pages 1-8.

The terms of the Stipulation provided that there would be a reappraisal of the exchange value of the shares of minority stock of each of the three plantations as of the date of the mergers. This reappraisal was to be conducted by independent experts to be appointed by and under the supervision of the Court. The cost of the reappraisal was to be (and was) paid by

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[2]Petitioners imply on page 4 of their petition that by granting summary judgment on the issue of liability, the District Court found as a matter of law that at least some undervaluation had occurred. In fact, the Court did *not* so hold, and the suggestion that undervaluation had been demonstrated is totally without foundation.

[3]Defendants' opposition to the motion for summary judgment raised serious and substantial questions which subsequently caused the District Court to state:

> "Although summary judgment was granted to plaintiffs under Section 10(b) of the 1934 Act, the outcome of an appeal on liability is uncertain since Amfac controlled all three plantations and could have consummated the mergers without the vote of a single minority shareholder." [XVII C.T. 5297 (footnote)].

Amfac. If, as a result of the reappraisal, it was found that the values attributed to the stock in any of the plantations was greater than the value of the Amfac stock received in exchange for the plantation stock, Amfac would be required to pay into Court for the benefit of the minority stockholders the excess of the values determined by the reappraisal—eighty percent in common stock of Amfac and twenty percent in cash.

Paragraph 6 of the Stipulation was of particular importance and provided:

> "Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; *provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other effect to such comments, as it may deem advisable.*" [App., p. 3]. [Emphasis added].

Paragraph 7 of the Stipulation went on to provide that if comments were served and filed, the appraisals would become final 30 days after they were filed, but if no comments were filed, the appraisals would become final fifteen days after they had been filed. Notwithstanding the provision for comments, however, the Stipulation went on in Paragraph 7 specifically to state that:

> "The appraisals prepared by the investment banker shall be final, conclusive, and binding on the parties, and *no appeal or review shall lie therefrom.*" [Emphasis added] [App., p. 3].

This last clause was the foundation of the settlement, yet petitioners have consistently ignored it, to the extent that they entirely fail to note its existence in their instant petition.

**B. Petitioners Have Inexcusably Failed to Disclose the Final and Nonappealable Nature of the Appraisals Made Pursuant to the Stipulation of Settlement.**

The gravamen of the complaint in this action was whether the exchange ratios used by Amfac in effectuating the merger of the three plantations were arrived at as a result of work done by "independent" appraisers. The Stipulation of Settlement thus assured petitioners of complete relief by providing for the appointment by the Court of an independent investment banker, approved by both parties, which was to perform its duties as an officer of the Court under the sole direction and supervision of the Court. [Pet. App., A28]. Recognizing, however, that even when appraisals are performed by an independent, court appointed appraiser, the parties might have useful insight to shed on the subject, the Stipulation provided for a comment procedure [paragraph 6, quoted above] and further specifically stated that whether or not comments were filed, "the appraisals . . . shall be final, conclusive, and binding on the parties, and no appeal or review shall lie therefrom." [App., p. 3].

Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, notice of the proposed settlement was mailed to each member of the class. That notice clearly described the final and nonappealable nature of the appraisals to be performed under the Stipulation, and based upon that representation, the majority of the class opted for the settlement. Furthermore, peti-

tioners and their counsel consistently emphasized to the Court the importance of the finality of the appraisals.[4]

On November 15, 1971, the Court entered its Opinion and Order finding the proposed settlement to be fair, adequate and reasonable [XVII C.T. 5290]. Notably, Petitioners' Memorandum in Support of Proposed Settlement glowingly described the settlement as follows:

> "The proposed settlement also eliminates the risk to plaintiffs which continuing this litigation would necessarily entail. In the absence of a settlement, expensive and time-consuming appeals on the merits would be inevitable. It is impossible to predict with certainty the ultimate disposition of this case upon appeal. Thus, the members of the classes would face the risks of reversal on liability, on damages or on both. *The proposed settlement provides that the appraisals shall be final, conclusive and binding on the parties, and no appeal or review will lie therefrom.*
>
> Hence, the proposed settlement *guarantees* for the classes that which prosecution to final judgment could not, i.e., an independent appraisal of the valuation of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, *and no appeals.*" [XVI C.T. 5144-5145] [Emphasis added].

On November 22, 1971, an Order was entered dismissing the action with prejudice as to all defendants,

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[4]See, *e.g.*, XVI C.T. 5005; XVI C.T. 5144-5145; R.T. 69-70 (September 17, 1971); R.T. 75 (September 17, 1971); R.T. 76-77 (September 17, 1971); R.T. 78 (September 17, 1971); XVII C.T. 5296-5297 [Court's Opinion and Order of November 15, 1971, based upon language of petitioner; see R.T. 108 (September 17, 1971)].

reserving jurisdiction only to implement, supervise and enforce the terms of the Stipulation [XVII C.T. 5317].

Shockingly, petitioners have failed to advise this Court of the final and nonappealable nature of the appraisals performed pursuant to the Stipulation. The reason for such an omission is obvious—petitioners accepted and retained over $400,000 in costs and fees paid to them by Amfac in reliance upon the finality of the Stipulation and the resultant appraisals and thereafter disavowed their Court approved Stipulation and prosecuted the appeal giving rise to the Petition for Certiorari now before this Court. For this Court to accept petitioners' artful and incomplete argument and grant a review would result in a grave miscarriage of justice.

**C. Petitioners Have Intentionally Misinterpreted and Selectively Quoted From the Instructions Given to the Appraisers Pursuant to the Stipulation of Settlement.**

With the prior consent of petitioners and Amfac, the Court appointed Eastman Dillon, Union Securities & Co. ("Eastman Dillon") as the independent appraiser responsible for the appraisals required by the Stipulation. The Court similarly appointed Gilbert W. Root ("Root"), an experienced appraiser of Hawaii real estate, to assist in the determination of realty value. As required by the Stipulation, the Court orally instructed the appraisers in terms jointly drafted by petitioners and Amfac. Because of petitioners' conduct in prosecuting the appeal giving rise to the petition now before this Court, petitioners understandably have played down all aspects of the instructions which relate to the independence of the appraisers and the finality of their appraisals.

For instance, though repeatedly stating their position that the appraisers failed to follow the instructions, which instructions according to petitioners set forth a "mandatory" method of appraisal, petitioners have made no reference at all to that portion of the instructions (and the Stipulation upon which said instructions were based) which permitted the parties to submit comments on the appraisals. Petitioners utterly ignore the fact that the appraisers *were not required to adopt the comments of either party,* but rather were instructed:

> "*You may disregard or consider* [*such comments*] *in your discretion.* You will have fifteen (15) days from the expiration of said period within which to make any revisions to the report which *you* deem necessary or appropriate. *Absent fraud, your final decision as to the determination of the fair value of a share of the capital stock of the Plantation companies will be final and binding upon the parties and nonappealable.*" [Pet. App., p. A27]. [Emphasis added].

This provision, particularly when read with the portion of the instructions directing the appraiser to approve the value of the Plantation stock "in the manner ordinarily, customarily and usually recognized in your profession" [Pet. App., p. A27] is inconsistent with the highly restrictive and unsupportable interpretation of the appraiser's function which petitioners would urge as being mandated by the instructions.

The second major omission in petitioners' analysis of the instructions appears on page 6 of the petition where, when describing the appraisers' duties, petitioners state that "their [the appraiser] determination

of the value of the capital stock of each of the Plantations was to be final and binding." The extent to which petitioners have been less than forthright in that statement is highlighted by again quoting in full the following portion of the instructions given to the appraisers:

> "*Absent fraud* your final decision as to the value of the capital stock of the Plantation Companies will be final and binding upon the parties *and nonappealable.*"

The omitted words point up the inconsistency between the clear intent of the instructions and the restrictive interpretation advanced by petitioners. Moreover, it is the critical point which distinguishes the instant case from *Marceron v. Chevy Chase Service, Inc.*, 258 F.2d 255 (D.C. Cir. 1958), on which petitioners base their argument that there is a split in the circuits. See discussion, *infra*, at pages 18-20.

Petitioners' third major misinterpretation of the instructions to the appraisers relates both to the function to be played by Gilbert Root in the determination of fair exchange value and to the importance of the concept of "net asset value". Petitioners have seized upon their definition of net asset value as "a theoretical liquidation value" to support their argument that:

> "all parties were in agreement that Root was *required* to appraise the theoretical liquidation value of the substantial real estate holdings, Eastman Dillon was *required* to appraise the theoretical liquidation value of the non-real estate assets and Eastman Dillon was *required* to consider and give some weight to the theoretical liquidation value of *all assets* in fixing the fair value of the Plantation stock." (Petition, p. 9) [Emphasis added].

Petitioners argue from this misrepresentation that Eastman Dillon "never appraised the theoretical liquidation value of real estate employed in the Plantations' sugar operations . . . and, therefore, could not and did not include any amount for the liquidation value of said real estate and other assets in its appraisal of the Plantation stock." (Petition, p. 10).

This argument finds no support in the instructions to the appraisers to "consider" all relevant value criteria. Petitioners' distortion is highlighted in footnote 9 (p. 10) to the Petition, where the following statement is found:

> "Petitioners vigorously assert, however, that under the Stipulation of Settlement and the jointly drafted instructions, Eastman Dillon *was required to include* the 'net asset value', i.e. the liquidation value, of all of the Plantations' assets, including the real estate and other assets employed in sugar operations as one of the essential criteria of the value of the Plantations' stock." [Emphasis added].

The word "include", of course, is not found in the instructions, which require only that certain aspects must be "considered". Petitioners' substitution of "include" for "consider" is but one further example of their material distortion of the instructions in an attempt to convince the Court to grant a review when all rights to review and appeal have been specifically waived.

Even if, as contended by petitioners, Eastman Dillon were required to make a net asset or liquidation valuation, Eastman Dillon was not required to give such a valuation any particular weight. Such was the express holding of the Delaware Supreme Court in *Sterling v.*

*Mayflower Hotel Corp.*, 93 A.2d 107, 111-116 (Sup. Ct.Del. 1952). For all practical purposes, the *Sterling* case involved issues of fact and law identical to those in the present case.

**D. Petitioners Have Inaccurately Characterized the Effect of the Decisions of the Courts Below.**

Petitioners repeatedly argue that the effect of the decisions of the District Court and the Court of Appeals, if not reversed, would be to permit a party found guilty of securities law fraud to retain the multi-million dollar bounty of its fraud. Two points must be made with respect to that argument. First, the thrust of Judge Tavares' ruling on summary judgment was that the proxy statements issued by Amfac did not adequately disclose the relationship between Amfac and Dean Witter and, that as a result of that relationship, Dean Witter was not an "independent" appraiser. The summary judgment did not determine that the Dean Witter exchange ratios themselves were improper or that Amfac received any windfall whatsoever as a result of the mergers. An understanding of the basis of the ruling on the summary judgment motion is crucial to an understanding of the Stipulation of Settlement and the Instructions to the appraisers, particularly with respect to the provision therein relating to the finality of the appraisals "absent fraud". The principal purpose of the settlement was to insure the independence of the appraisers, and at no time have petitioners raised any question as to the independence of either Eastman Dillon or Root.

Second, it is difficult to understand how, if Amfac received a windfall from the merger, petitioners would not have received a similar windfall. The value of the Amfac stock given in exchange for plantation stock was

limited to the average resale price of Amfac stock on the New York Stock Exchange during a specified period. If we are to accept petitioners' views that the plantations were worth untold millions more than the appraised value, than the Amfac shares given in exchange for the Plantation shares should be given a greater pro rata value because, at the time of the merger, Amfac owned most of the shares of the three plantations. Similarly, petitioners ignore the fact that this was not a merger for cash but rather by way of exchange of shares. If, in fact, Amfac received a bargain, petitioners received the same bargain and will share pro rata in the benefits, since they now hold Amfac stock.

**E. The Circumstances Surrounding the District Court Hearing and Determination of Petitioners' Challenge to the Validity of the Appraisals Require Denial of the Petition.**

On October 5, 1972, the appraisers filed their appraisals. Those appraisals determined that the exchange values found by Dean Witter in the original merger transaction were proper and, in fact, were higher than the values found by the court's appraisers. On October 24, 1972, petitioners filed 47 pages of comments analyzing the Eastman Dillon appraisals. Thereafter, on November 17, 1972, Eastman Dillon acknowledged receipt of the comments and increased its appraisals on two of the three plantations. Even with the increased valuations, however, Eastman Dillon concluded that the original exchange of Amfac stock had not only given fair value, but a higher value, to the minority shareholders of the Plantations.

On November 3, 1972, two weeks *before* the November 17, 1972 letter to the Court from the appraisers

after review of petitioners' comments, petitioners filed a Motion to Set Aside Appraisals on the grounds, *inter alia*, that they were "fraudulent", and proceeded to summarize fourteen alleged items in support thereof [XIX C.T. 5887], all of which had been thoroughly presented in petitioners' 47 pages of comments filed on October 24, 1972. Neither the comments, nor any of the items set forth in petitioners' motion, nor any other documents submitted by petitioners since the signing of the Stipulation of Settlement, have asserted facts, which, if true, would constitute fraud. Rather, petitioners have instead repeatedly thrust upon the Court their view of the manner in which Eastman Dillon should approach problems of evaluation, so that the values established by the appraisals would be substantially increased. Although petitioners have repeatedly used words such as "fraudulent", never have petitioners even attempted to spell out anything akin to fraud, or to collusion which might be equated to fraud. Petitioners have blithely ignored the Stipulation and the retention of very substantial monies, and have asserted, and continue to assert in their Petition to this Court, a right to appeal which right was expressly waived by the provisions of the Stipulation that provide that the judgment of the appraisers would be final and not appealable.

Over respondent's strenuous objections, a hearing was set on the motion to set aside the appraisals. After extensive examination and cross-examination of the appraisers covering a three-day period in December of 1972, and after complete legal briefing and argument, on March 19, 1973, the Court made and entered its Decision on Challenge to the Validity of Eastman Dillon's Appraisals, in which it denied all motions to

set aside the appraisals and directed that said appraisals take effect under the terms of the previously approved settlement agreement. [Pet. App., pp. A4-A24]. It must be kept in mind that at every available opportunity prior to the hearing before the District Court, particularly during the period prior to the time that Judge Pence indicated he would hold a hearing with respect to the validity of the appraisals, petitioners made repeated charges and allegations that those appraisals were fraudulent. As they well knew, no less a charge than fraud would induce the Court to order any hearing and it was only because of such charge that a hearing, in fact, was held. When the hearing took place, however, petitioners submitted no evidence of fraud nor did they allege a single fact which, if true, would have tended to establish fraud. By the time of the hearing itself, petitioners had conceded that they could not show "venal" fraud, and specifically so stated in their closing argument when their counsel said:

> "We have not offered evidence nor are we asserting at this time that either Mr. Root or Eastman Dillon is guilty of the type of venal fraud which Your Honor has mentioned. We believe that they are wrong. We believe that they did not follow the instructions. We believe that they have not complied with the order of this Court. We believe they have not done their job and they are not entitled to have the product approved by this Court, but we are not saying that they have been guilty of venal fraud." [R.T. 449-450 (Dec. 6, 1972)].

Having bootstrapped themselves into a hearing, petitioners then contended before the District Court, and

again contended on appeal (and now petition for review based upon the identical contention) that merely because the appraisers testified that they had received certain information from Amfac, it was error not to permit petitioners to examine Amfac's officers to test the truth of that information. Petitioners disregard the fact that the instructions to the appraisers were that they "shall have complete access to all records and information in the custody and control of Amfac, Inc. as . . . [they] may require to perform [their] appraisals."

Thus, the very information gathering process ordered by the Court has become the basis of petitioners' argument that it was error not to permit petitioners to engage in (using the words of the trial court) a "fishing expedition" for fraud, even though they had not made one single factual allegation of fraud of any kind.

The apparent motivation for petitioners' acts following their filing of the Eastman Dillon appraisal, including their petition to this Court, may be found in the terms of the Stipulation, which provide that not only would Amfac pay the appraisal costs, but also, if it were found that the value attributed to the stock of any of the plantations was greater than the value of the Amfac stock received in exchange, then Amfac would be required to pay into Court the excess of the values determined by the appraisals—80% of such in excess to be in stock of Amfac and 20% in cash [App., pp. 4-5]. This provision was obviously a gambit by petitioners' counsel, since the Stipulation went on to provide in paragraph 13 thereof that Amfac was not to object to any fee application by counsel for petitioners which did not exceed the 20% cash fund which would be so created [App., pp. 4-5]. Clearly, the im-

petus for the appeal to the Ninth Circuit and for the petition to this Court was created when the Eastman Dillon appraisals revealed that the original Dean Witter valuations were on the generous side and that there would be no funds available for additional attorneys' fees.

## IV.

## Argument.

### A. This Is Not a Proper Case for the Granting of Certiorari.

The considerations governing the grant or denial of a Writ of Certiorari are specified in Rule 19 of the Revised Rules of the Supreme Court of the United States and were summarized by Mr. Justice Harlan in his dissenting opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 478-479, 88 S.Ct. 2186, 2223, 20 L.Ed. 2d 1189 (1968), where he stated:

> "[C]ertiorari jurisdiction was not conferred upon this Court 'merely to give the defeated party in the . . . Court of Appeals another hearing,' *Magnum Import Co. vs. Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922, or 'for the benefit of the particular litigants,' *Rice vs. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, but to decide issues, 'the settlement of which is of importance to the public as distinguished from . . . the parties,' *Layne & Bowler Corp. vs. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712."

Additionally, certiorari should be granted "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Well Works, Inc.*,

261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1922), or where the petition raises a federal question of substance. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L. Ed. 897 (1955). As Mr. Justice Frankfurter stated in *Rice:*

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Respondent respectfully submits that the Petition for Certiorari meets none of the requirements set forth in Revised Rule 19 for the granting of certiorari. The contention that there is a conflict between the circuits is demonstrably transparent and without merit. Similarly, the questions presented, even if they were not based upon misstatements of the record, are not important questions of federal law which require adjudication by this Court.

**B. The Alleged Conflict Between the Circuit Courts of Appeals Is Illusory.**

The primary ground for petitioners' prayer that a Writ of Certiorari issue is that the decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 157 (D.C.Cir. 1958). In fact, the alleged conflict is illusory.

It is true that in *Marceron*, the Court of Appeals reviewed the appraisers' interpretation of their instructions. It is important, however, to focus on the precise language used by the Court in permitting such a review. As quoted on page 21 of the Petition, now Chief Justice Burger declared:

> "Thus it appears that the appraisers' construction of the formulae can properly be reviewed by the trial court *and* by us." [Emphasis added] [258 F.2d at 158].

"Can" is not "shall" or "must" and therefore the review by the trial and appellate courts in *Marceron* was discretionary, even under the facts of that case. At the very most, therefore, *Marceron* indicates that a Court of Appeals may, under certain circumstances, exercise its discretion to review the manner in which appraisers or arbitrators have performed their duties. Those circumstances are where the parties have not granted the power to make final and binding decisions in the appraisers.

In *Marceron*, the Court said:

> "In effect, arbitrators are private judges whose powers are defined by contract. . . .
>
> Here we are dealing with appraisers appointed solely to appraise value of real estate and its rental value. To be sure, they had to make a preliminary or tentative interpretation of their instructions and powers as defined in the leases. But that does not carry with it power to do so with finality. The parties *could* have vested such final authority in third persons, but it is not to be implied from a grant of authority to appraise value." 258 F.2d at 158.

Of course, in the present case, it is manifest from the Stipulation that the "final authority" referred to in *Marceron* was vested in Eastman Dillon. Paragraph 6 of the Stipulation for instance, specifically provided that, after the appraisers had submitted their reports, the parties could submit comments to the appraisers with respect to the reports, but provided further that ". . . such written comments shall be *advisory only* and the investment banker may adopt *or reject* any such written comments, in whole or in part, or give such other effect to such written comments, as it may deem advisable." [Emphasis added] [App., p. 3]. The power vested in the appraisers to accept or reject any comments on the appraisals necessarily includes the power to accept or reject comments with respect to the manner in which the appraisals were performed, since in this instance, technique and conclusions are inseparable. This is consistent with paragraph 7 of the Stipulation which expressly provided that "the appraisals prepared by the investment banker shall be final, conclusive and binding on the parties and no appeal or review shall lie therefrom." [App., p. 3].

Had no such authority been vested in the appraisers in this case, the underlying question to be answered by this Court, if certiorari were to be granted, would be whether the Court of Appeals properly exercised its discretion *not* to review the findings of the District Court with respect to the appraisals. Of course, this Court should not be asked to utilize its certiorari power to review an exercise of discretion except under the most unusual circumstances. As has already been demonstrated, such circumstances do not exist in this case and the decision of the District of Columbia Circuit in

the *Marceron* case is consonant with the decision of the Court of Appeals below.

**C. The Petition for Certiorari Raises No Question of Federal Law of Sufficient Importance to Require a Decision by This Court.**

Petitioners, by hyperbole, have sought to make it appear that policy questions relating to the implementation of the Securities Exchange Act of 1934 are at issue here. Nothing could be further from the truth. The only issue here is the implementation of a written settlement agreement. In their attempt to elevate the issues in this case to Supreme Court level, petitioners have sought to equate a settlement with a finding against respondent on the merits. Specifically, petitioners assert at page 19 of their Petition:

> "Just as the 1934 Act itself must be broadly and liberally construed in a manner which effectuates its remedial purposes, so too proceedings to implement a settlement after a party has been found guilty of federal securities law fraud must give effect to the remedial purpose of compelling the wrongdoer to disgorge his illegal gains."

Petitioners' statement quoted above ignores two vital issues. First, in the context of implementing a settlement agreement, the fact that a summary judgment as to liability has been granted is immaterial, particularly where the summary judgment was predicated only on an issue of disclosure and did not determine, in any manner whatsoever, that Amfac had obtained any monetary advantage. Secondly, in the context of implement-

ing a settlement agreement, as opposed to fashioning a remedy as was true in *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964), the remedial purposes of the act are immaterial. In a settlement agreement, it is assumed that the parties are attempting to remedy any wrong that may have occurred by contract and the Court should not (and, indeed, may not) alter the agreement of one of the parties to such a contract without altering the agreement of all parties.

What petitioners' argument implies is that once a party has suffered an adverse decision on a question of liability under the Securities law, all questions arising with respect to the implementation of a subsequent settlement agreement should be resolved against that party in order to effectuate the remedial purposes of the Securities Exchange Act. Contrary to petitioners' argument, nothing could be more destructive to the possibilities of settlement actions than the acceptance of this proposition. For example, a serious question existed in this case as to whether Judge Tavares' finding of liability could withstand an appeal to the Court of Appeals in view of Amfac's overwhelming majority position in each of the plantations [See footnote 3, *supra*]. This was recognized by petitioners' counsel at the time the settlement agreement was submitted to the Court for approval [R.T. 68-69 (Sept. 17, 1971)]. When petitioners bargained away their rights to a jury trial on the issue of damages (as alleged at p. 19 of the Petition), Amfac and the other defendants bargained away their right to appeal from the determination of the District Court upon the summary judgment, which decision both petitioners and the Judge conceded was subject to serious question. No party would bargain away such a right if petitioners' present

position were adopted; indeed, such adoption would discourage settlement of securities actions and force them back into the Courts. Here, Amfac gave up its right to appeal from the summary judgment, gave up *its* right to three separate jury trials on the issue of damages as to each plantation, agreed to abide by the decision of a Court-appointed and supervised appraiser as to the issue of damages, agreed that if the Court-supervised appraisal showed that petitioners had been damaged to pay into Court *the full amount of such damage,* waived its right to appeal from the determination by the Court-appointed appraisers, and, in addition, paid to petitioners a sum of money in excess of $400,000 as and for their attorneys' fees and costs. In exchange for this, petitioners were merely asked to similarly waive their right to a jury trial on damages and to waive their right to appeal from the determination of the Court-appointed appraisers. In effect, Amfac agreed to give to petitioners everything that they could possibly recover under a jury trial in exchange for the waiver of the right to such jury trial and the waiver of right to appeal. Petitioners, with full knowledge of every detail of such an agreement, entered into the Stipulation of Settlement and when the decision of the Court-appointed appraisers showed that petitioners were not entitled to any damages and had not been damaged by the merger, petitioners sought to overturn the Stipulation and still continue in that effort by their Petition to this Court. Clearly, a review of the facts in this case leads to the inescapable conclusion that no issue of constitutional or federal significance is presented and that no issue worthy of review by this Court has been raised by petitioners.

## V.

### Amfac's Request for Damages.

When petitioners, in disregard of their express waiver of all right to review or appeal from the decision of the District Court approving the valuations determined by the Court-supervised appraisers, filed their appeal to the Ninth Circuit, despite the fact that they accepted and now retain over $400,000 in attorneys' fees and costs paid by Amfac in reliance upon the waiver, Amfac moved to dismiss the appeal and for an award of sanctions. A copy of that motion is incorporated in the Appendix hereto as pages 8 through 40. By the ruse of seeking expeditious disposition of the appeal, petitioners immediately filed their opening brief and moved to expedite the appeal before the Ninth Circuit could rule on the motions to dismiss and for sanctions. As a result, the appeal was expedited, all documentation was considered simultaneously, the motions were denied and the decision of the District Court was summarily affirmed [Pet. App., pp. A1-A2].

Respondent respectfully urges that petitioners' conduct as summarized above, and as is set forth in detail in the copy of the motions appended hereto [App., pp. 8-40], clearly shows that there is no ground for the granting of the Petition for Writ of Certiorari filed herein and fully justifies an award of reasonable damages, including but not limited to the cost of printing this brief in opposition, as is provided in Rule 56(4) of the Revised Rules of this Court. It need only be

pointed out that in *Whitney v. Cook*, 99 U.S. 607, 25 L.Ed. 446 (1879), this Court said:

> "Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

Similarly, this Court has frequently said that "where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed." *Salker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 159, 73 L.Ed. 258 (1929); *Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 160-161, 73 L.Ed. 261 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 233-234, 43 S.Ct. 589, 592, 67 L.Ed. 961 (1923); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109, 33 S.Ct. 80, 83, 57 L.Ed. 140 (1912).

Respondent respectfully submits that in light of the foregoing authorities an award of damages is fully justified in this case.

## VI.

## Conclusion.

Respondent respectfully submits that petitioners have failed to show any ground sufficient to justify this Court exercising its certiorari jurisdiction. In essence, the Petition asks this Court to review a judgment of the United States District Court for the District of Hawaii which stated that certain Court-supervised appraisals "are found to be neither fraudulent nor erroneous, and are approved" [XX C.T. 6240]. It is elemental, that even if the question were of such magnitude to justify the attention of this Court, petitioners have failed to carry their burden of demonstrating the error of that decision.

As has been repeatedly set forth, the only basis upon which the trial court could have set aside the Court-supervised appraisals was if they were tainted by fraud or collusion—that is, if they were the product of venality. Petitioners, however, have specifically acknowledged that they have not demonstrated fraud or collusion. Their only suggestion, made totally without supporting facts, is that there may have been "constructive" fraud of an indeterminate nature. Clearly, this is insufficient to sustain petitioners' burden of showing error in the trial court's finding (as summarily affirmed by the Ninth Circuit) that the Court-supervised appraisers acted properly and that the appraisals were not fraudulent.

What this Petition really reduces to is an unsupported charge that the values found by the Court-supervised appraisers should have been higher. But petitioners waived the right to litigate this question when they agreed to settle the underlying action, to bring in independent Court-supervised appraisers and to waive all

rights of review or appeal from the values found by those appraisers. To now permit petitioners to upset their stipulation by making irresponsible charges which are totally unsubstantiated would be a gross miscarriage of justice. Tricks of advocacy should not be countenanced to lend apparent substance to a frivolous and vexatious appeal. *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64, 67-68 (1st Cir. 1959).

So that respondent will not be chided for using injudicious language, we quote from the oral argument of Bruce W. Kauffman, Esq., petitioners' lead counsel, presented to Judge Tavares in this action on August 18, 1972, changing only the name of "Handy" (petitioners' co-plaintiff, now dismissed from this action) to "petitioners". Mr. Kauffman's statements represent respondent's position with respect to the filing of the appeal to the Ninth Circuit and with respect to the filing of the Petition herein.

> "He [petitioners] was present in court on March 6th and observed the appointment of the appraisers by the Court, personally listened to the directions by this Court to the appraisers, was personally aware of the fact that this Court retained the right to reject any appraisal report which was tainted by fraud or by other irregularity such as fraud."
>
> "Nevertheless' . . . [petitioners] has made no effort to bring to the attention of this Court any evidence of any kind relating to fraud or irregularity and, Your Honor, I think that it's perfectly clear that the reason for that is that there is no such evidence; the charges were without basis, irresponsible and malicious, and brought only for

the purpose of harassing the independent appraisers, harassing counsel, and continuing the barrage of activity which unconscionably has increased the amount of time which counsel has had to devote to this case, the amount of time which this Court and the Ninth Circuit has had to devote to this case and the amount of exenses—out of pocket disbursements which have had to be incurred in this case." [R.T. 4-5 (Aug. 18, 1972)].

In light of the foregoing, respondent respectfully prays that the Petition for Writ of Certiorari be denied and that respondent be awarded its damages suffered by way of this frivolous Petition.

Respectfully submitted,

MARTIN GENDEL, Esq.,
GENDEL, RASKOFF, SHAPIRO & QUITTNER,
*Attorneys for Respondent, Amfac, Inc.*

*Of Counsel:*

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Los Angeles, Calif. 90048.

## APPENDIX.

### Stipulation of Settlement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

| | | |
|---|---|---|
| NORTHERN ACCEPTANCE TRUST 1065, by ROGER JON DIAMOND, Co-Trustee, et al., | ) | |
| Plaintiffs, | ) | Civil Action |
| vs. | ) | No. 70-3107 |
| AMFAC, INC., et al., | ) | |
| Defendants. | ) | |

Plaintiffs, by their Attorneys, DILWORTH, PAXSON, KALISH, LEVY & COLEMAN, and PADGETT, GREELEY, MARUMOTO & AKINAKA, and Defendants AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., a wholly-owned subsidiary of Amfac, Inc., PUNA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., KEKAHA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR., JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON and FIREMAN'S FUND AMERICAN INSUR-

ANCE COMPANIES, by their Attorneys, CADES SCHUTTE FLEMING & WRIGHT, hereby stipulate and agree as follows:

INTRODUCTION:

1. Plaintiffs and the above-named defendants (such plaintiffs and the defendants above-named sometimes hereinafter called "the parties") shall compromise and settle the above-captioned action amicably, upon the terms and subject to the conditions set forth below, pursuant to the provisions of Rules 23 and 23.1, Federal Rules of Civil Procedure, in such a manner to be binding upon the parties in accordance with said Rules and in full and final discharge of all claims and matters which have been asserted or might have been raised in connection with the matters involved, directly or indirectly, in this action.

## PART A
## CLASS ACTION SETTLEMENT AGREEMENT

2. Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter called the "investment banker") shall be appointed by the Court to appraise the value, as of January 1, 1969, of the capital stock of The Lihue Plantation Company, Limited, Puna Sugar Company, Limited and Kekaha Sugar Company, Limited (hereinafter called the "plantation companies"). The investment banker shall act as an officer of the Court under the Court's sole direction and supervision as hereinafter set forth.

3. Amfac hereby agrees that the investment banker shall have complete access to all records in the custody or control of Amfac which relate or refer in any way whatsoever to the plantation companies.

4. The Court shall issue instructions to the investment banker in substantially the form attached hereto as Exhibit "A".

5. The investment banker shall file with the Court, and serve upon counsel for the parties, its appraisals ("original appraisals") no later than six months after its appointment. An extension of time for the filing and serving of said original appraisals shall be granted only by the Court and only for good cause.

6. Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other effect to such written comments, as it may deem advisable.

7. In the event that no written comments are filed with the Court and served upon the investment banker and opposing counsel, such original appraisals shall become final 15 days after their filing and service. In the event that written comments are filed with the Court and served upon the investment banker and opposing counsel, such original appraisals, or modified appraisals, if any, shall become final 30 days after the filing and service of the original appraisals, unless such time is extended by an order of the Court at the request of the investment banker. The appraisals prepared by the investment banker shall be final, conclusive, and binding on the parties, and no appeal or review shall lie therefrom.

8. Amfac shall pay into, for disbursement by, the Court such fees and disbursements as the Court may

award for the appraisals prepared by the investment banker.

9. If the value as determined by the investment banker of a share of stock of any of the plantation companies involved in the action (hereinafter called the "plantation stock") shall exceed the value which is the product of the applicable exchange ratio in connection with the mergers of the plantation companies into Amfac or subsidiaries of Amfac, multiplied by the value of the shares of Amfac stock for which the particular plantation stock was to be and was exchanged in said mergers (the value of a share of Amfac stock to be the average closing price of a share of Amfac common stock on the New York Stock Exchange during January, 1969, with the value of a share of Amfac convertible preferred stock involved in said mergers deemed to be the value, as so determined, of the shares of Amfac common stock into which such share of preferred stock was convertible), Amfac shall pay into Court with respect to the particular plantation stock, within 14 days after the original appraisals prepared by the investment banker become final, 80% of the aggregate excess with respect to all shares of that particular plantation stock held of record on October 31, 1968 by the members of the class in this action who have not excluded themselves from the class by virtue of Rule 23, Federal Rules of Civil Procedure, in shares of Amfac common stock, the attributed value of each of which shares to be the closing price of a share of Amfac common stock on the New

York Stock Exchange on the trading day immediately preceding the date of payment of said shares into Court, plus the dividends which otherwise would have been payable on said shares from the effective dates of said mergers, and the remaining 20% of said aggregate excess in cash.

10. If the value as determined by the investment banker of a share of a particular plantation stock shall be lower than the value equal to the applicable product as provided in paragraph 9 of Part A hereof, Amfac shall pay nothing into Court with respect to that particular plantation stock and neither plaintiffs nor any other class members shall have any obligation to reimburse Amfac in any amount with respect to that or any other plantation stock.

11. Amfac shall pay to counsel for plaintiffs the counsel fees and the costs and out-of-pocket disbursements in the amount and at the time provided for Part B hereof.

## PART B

## COUNSEL FEES

12. Amfac hereby agrees to pay to the counsel for plaintiffs, Dilworth, Paxson, Kalish, Levy & Coleman, Kenneth P. Kimmel, Esq., Alexander Kahan, Esq. and Padgett, Greeley, Marumoto & Akinaka, for services performed in the action and for all judicially compensable costs and out-of-pocket disbursements of every description incurred by plaintiffs and their counsel in connection with the action, the sum of THREE

HUNDRED EIGHTY-FIVE THOUSAND DOLLARS ($385,000.00).

13. Amfac and the above-named defendants and their counsel agree that the payment of the amount set forth in paragraph 12 hereof will not bar an application by plaintiffs' counsel to the Court for an allowance of attorneys' fees, costs and out-of-pocket disbursements from any fund which might be created for the benefit of the plaintiffs and the classes they represent as the result of the original appraisals. Amfac and the above-named defendants and their counsel stipulate that they will make no objection to an application for such an allowance which does not exceed twenty percent (20%) of such fund.

14. Amfac shall pay to Dilworth, Paxson, Kalish, Levy & Coleman on behalf of all counsel for the plaintiffs the counsel fee and the costs and out-of-pocket disbursements provided for in paragraph 12 hereof no later than 14 days after the Court's approval of the Class Action Settlement Agreement set forth in Part A hereof becomes final pursuant to Rule 23, Federal Rules of Civil Procedure and the time within which plaintiffs or other class members may appeal therefrom expires.

## PART C
## MISCELLANEOUS

15. Prior to its appointment by the Court, the investment banker shall be instructed by the Court to disclose in writing to the Court and counsel for the parties

any fact which might be the basis of a conflict of interest. In the event that a conflict is disclosed, any of the parties may request that the Court disqualify the investment banker. In the event that the investment banker is not willing to serve or is disqualified from serving, then the investment banker shall be a similarly competent firm which shall be acceptable to all parties. Approval of any such successor investment banker shall not be unreasonably withheld by any party.

16. The parties hereby agree that they will prepare and execute all documents of any kind necessary to implement the provisions of this Stipulation of Settlement within a reasonable time after being requested to do so, including but not limited to a final consent judgment or decree to be entered by the Court forthwith upon its approval of the Class Action Settlement Agreement pursuant to Rule 23, Federal Rules of Civil Procedure, under which judgment or decree the court would retain jurisdiction over the parties and all other persons not parties hereto but involved in the action and over the subject matter of the action, for the sole purpose of implementing and enforcing the Class Action Settlement Agreement as so approved.

17. The parties hereby agree that they will execute all necessary and appropriate dismissals and releases relating to the action.

18. The parties hereby agree that any such final consent judgment or decree or dismissal or release relating to this action shall include defendants Dean Wit-

ter & Co., Dean Witter & Co., Inc. and Haskins & Sells (hereinafter called the "additional defendants") and shall release and discharge all claims by plaintiffs against said additional defendants as though they were parties to this Stipulation of Settlement.

19. The parties hereby agree to move the Court in this action for an order approving this Stipulation of Settlement and setting a date for a hearing at which time any member of the respective classes in this action may appear in person or by attorney to show cause why this action should not be compromised, settled and disposed of as proposed in this Stipulation of Settlement.

DATED: This 2nd day of August, 1971.

DILWORTH, PAXSON, KALISH, LEVY & COLEMAN

By /s/ Bruce W. Kauffman
On Behalf of Plaintiffs and
Attorneys for Plaintiffs Listed
Above

CADES SCHUTTE FLEMING & WRIGHT

By /s/ E. Gunner Schull
On Behalf of Defendants Listed Above

No. 73-2365.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

DERICKSEN M. BRINKERHOFF, etc., *et al.*,

*Appellants,*

*vs.*

AMFAC, INC., *et al.*,

*Appellees.*

---

**Motions by Amfac, Inc. to Dismiss Frivolous Appeal and to Impose Sanctions.**

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*To the Honorable Justices of the United States Court of Appeals for the Ninth Circuit:*

Appellee, Amfac, Inc., hereby moves the Court to dismiss the within appeal on the ground that it is frivolous and without merit. Appellee further moves the Court, pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1912 for an award of attorneys' fees, just damages and double costs.

Respectfully submitted,

CADES, SCHUTTE, FLEMING & WRIGHT,
DOUGLAS E. PRIOR, ESQ.,
DEBEVOISE, PLIMPTON, LYONS & GATES,
SAMUEL E. GATES, ESQ.,
IRWIN J. SUGARMAN, ESQ.,
GENDEL, RASKOFF, SHAPIRO & QUITTNER,
MARTIN GENDEL, ESQ.,
RICHARD S. BERGER, ESQ.,
By MARTIN GENDEL,
*Attorneys for Appellees.*

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS FRIVOLOUS APPEAL AND TO IMPOSE SANCTIONS.

This memorandum is submitted in support of the motions of defendant-appellee Amfac, Inc. to dismiss the within appeal as frivolous and without merit and to impose sanctions. The sole question presented by these motions is whether appellant can maintain this appeal in good faith when, pursuant to a Stipulation of Settlement entered into by the parties to this action under date of August 2, 1971, he has stipulated that an appraisal ". . . shall be final, conclusive and binding on the parties, and no appeal shall lie therefrom."

### I.
### STATEMENT OF THE CASE.

In May of 1969, a lawsuit entitled *Northern Acceptance Trust 1065 by C. Jon Handy, Trustee, and Dericksen M. Brinkerhoff, etc. v. Amfac, Inc., The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. Kekaha Sugar Co., Ltd., et al.*, was commenced in the United States District Court for the Central District of California by minority shareholders of Lihue, Puna and Kekaha (the "plantations") [I C.T. 3].* The action purported to be brought as a class action on behalf of all minority shareholders of the three plantations, and as a derivative action on behalf of these same three plantations as they existed prior to a merger with Am-

*All references to ".... C.T. ...." refer to the particular volume and page number of the Clerk's Transcript on appeal. All references to "R.T. .... (date)" refer to particular portions of the Reporter's Transcript of the proceedings held before the Court below.

fac, Inc. The complaint alleged violations of Section 17(a) of the Securities Act of 1933, and Sections 10 (b) and 14(a) of the Securities Exchange Act of 1934 and the regulations promulgated thereunder, as well as breach of common law fiduciary duties and fraud, all in connection with the reorganization and merger of the three plantations into wholly owned subsidiaries of Amfac, Inc. As part of the merger, the holders of the minority interest were to receive Amfac, Inc. stock in exchange for their holdings of plantation stock.

By order of the United States District Court for the Central District of California (affirmed by this Court) the action was subsequently transferred to the United States District Court for the District of Hawaii where, on January 26, 1971, the Honorable C. Nils Tavares granted plaintiffs' motion to maintain the action as both a class and derivative action [XI C.T. 3458]. The Court's opinion is officially reported at 51 F.R.D. 487 (D. Hawaii 1971).

In May of 1971 the District Court found that there had been a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and granted appellant's motion for partial summary judgment in favor of plaintiffs and against Amfac, Inc., and certain other named defendants on the issue of liability [XIV C.T. 4338; R.T. 5-8 (May 5, 1971)]. On May 17, 1971, the District Court denied defendants' motion for certification of an interlocutory appeal from its decision [R.T. 26-27 (May 17, 1971)], leaving defendants the right to appeal after trial of the case.

Shortly thereafter arduous and extensive arms length settlement negotiations commenced between counsel for appellant (representatives of the law firm of Dilworth, Paxson, Kalish, Levy & Coleman, hereinafter referred to as "the Dilworth firm") and counsel for Amfac. These negotiations resulted in a Stipulation of Settlement dated August 2, 1971 ("Stipulation") which the District Court by Opinion and Order entered on November 15, 1971 [XVII C.T. 5290] found to be fair, adequate and reasonable.

The terms of the Stipulation provided that there would be a reappraisal of the value of each of the three plantations as of the date of the mergers. This reappraisal was to be conducted by independent experts to be appointed by and under the supervision of the Court, and, in fact, was conducted by Eastman Dillon-Union Securities & Co. and Gilbert Root, the latter an experienced appraiser of Hawaii real estate. The settlement agreement specifically provided that the appraisals were to be final, conclusive and binding on the parties, with no appeal or review allowed therefrom. If, as a result of the reappraisal, it was found that the values attributed to the stock in any of the plantations was greater than the value of the Amfac stock received in exchange for the plantation stock, Amfac would be required to pay into Court for the benefit of the minority stockholders the excess of the values determined by the reappraisal—eighty percent in common stock of Amfac and twenty percent in cash.

In addition, the settlement agreement provided that Amfac was to pay $385,000.00 to all plaintiffs' counsel for fees and cost disbursements. This money, plus an added $20,000, has been paid; the major portion being received and retained by the Dilworth firm.

On November 22, 1971, the settlement having previously been approved, the Court entered an Order dismissing the action with prejudice, as to all defendants, but reserving jurisdiction over the administration of the settlement [XVII C.T. 5317].

Northern Acceptance Trust appealed the orders approving the settlement and dismissing the action to this Court. On May 17, 1972, this Court dismissed the appeal [XVIII C.T. 5570], and on June 12, 1972, it denied a motion by Northern Acceptance Trust to vacate and set aside the dismissal of the appeal [XVIII C.T. 5571]. Early in June 1972, Northern Acceptance Trust filed motions for a stay of the mandate and for enlargement of time to permit the filing of a Petition for Rehearing and Suggestion for Appropriateness of Hearing in Banc of Motion to Vacate and Set Aside Dismissal of Appeal. On July 21, 1972, this Court entered an Order denying the motions for stay of mandate and for enlargement of time.

Subsequently, Eastman Dillon-Union Securities & Co. filed and served its written appraisals, assisted by Gilbert W. Root, as the real estate appraiser [XVIII C.T. 5688]. The results of the appraisals substantiated the values attributed to the plantation stock in the original merger transaction objected to by the classes, and resulted in no increase in the exchange values, and, therefore, no recovery by the minority shareholders.

On November 6, 1972, appellant moved to set aside the appraisals on the ground that the appraisers had not performed their assigned duties as instructed, and that the appraisals were "fraudulent, grossly irregular [and] fundamentally unfair". After extensive examination and cross-examination of witnesses during a three-day hearing in December 1972, and legal briefing and argument, on March 19, 1973 the Court made and entered its Decision on Challenge to the Validity of Eastman Dillon's Appraisals, in which it denied all motions to set aside the appraisals and directed that said appraisals take effect under the terms of the previously approved settlement agreement. On March 23, 1973, the District Court signed and entered a judgment incorporating its decision with respect to the appraisals [XX C.T. 6238]. Because of improper notice to opposing counsel, on March 30, 1973, the District Court vacated its judgment of March 23, 1973 and ordered that the proposed judgment be submitted to counsel for plaintiffs for approval. After extensive briefs had been filed by all parties with respect to the form of the judgment, the matter was resubmitted without oral argument and on May 2, 1973, the District Court confirmed its original judgment and reinstated it as of March 23, 1973 [R.T. 9 (May 2, 1973)].

By stipulation dated April 24, 1973, Northern Acceptance Trust 1065 waived any right to appeal from the March 23, 1973 judgment. Hence, as to Northern Acceptance Trust, this litigation has been terminated. Plaintiff Brinkerhoff, however, on behalf of the classes, has prosecuted this appeal from the judgment of March 23, 1973.

II.

## THE SETTLEMENT AGREEMENT.

### A. The Stipulation of Settlement by Its Terms Provides That the Appraisals Are Not Subject to Appeal.

As set forth above, the Stipulation of Settlement provided that the appraisals ". . . shall be final, conclusive and binding on the parties, and no appeal or review shall lie therefrom." [XV C.T. 4802-4803]. This clause was the foundation of the settlement, and was intended so to be, as is clearly demonstrated both by the structure of the settlement agreement, as incorporated in the Stipulation of Settlement, and the representations made by counsel at the time it was submitted to the Court and the shareholders. What appellant and his counsel here seek to accomplish in the guise of an appeal is to vitiate both the letter and the intent of the Stipulation of Settlement and the District Court's opinion in connection with its approval. This is made clear by a review of the terms of the Stipulation and the proceedings had in connection with it.

The gravamen of the complaint in this action concerned the question of whether the exchange ratios used by Amfac in effectuating the merger of the three plantations were arrived at as the result of the recommendations of "independent" appraisers. The Stipulation of Settlement thus provided for the appointment by the Court of an independent investment banker to act as its officer performing the reappraisals contemplated by the Stipulation of Settlement (Stipulation ¶2) [XV C.T. 4802]. Recognizing, however, that even where the appraisals are performed by an independent, court appointed appraiser, the parties might have useful

insight to shed on the subject, the Stipulation provided in paragraph 6 that:

> "Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other affect to such written comments, as it may deem advisable." [XV C.T. 4802].

Paragraph 7 went on to provide that if comments were served and filed, the appraisals would become final thirty days after they were filed, but if no comments were filed, the appraisals would become final fifteen days after they had been filed. Notwithstanding the provision for comments, however, the Stipulation went on in paragraph 7 specifically to state that:

> "The appraisals, prepared by the investment banker shall be final, conclusive, and binding on the parties, *and no appeal or review shall lie therefrom.*" [Emphasis added] [XV C.T. 4802-4803].

Consistent with the terms of the Stipulation itself, and attached to it as Exhibit "A" was a proposed Order for appointment of the appraiser. That Order stated in the last paragraph thereof:

> "Your final decision as to the determination of the fair market value of a share of capital stock of the plantation companies will be final and binding upon the parties and non appealable." [XV C.T. 4811].

### B. The Notice to the Class.

Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, notice of the proposed settlement was mailed to each member of the plaintiff classes. Of paramount importance is the fact that in that notice the members of the classes were informed that:

> "Said appraisal will be under the sole direction and supervision of the Court, *and will be final, conclusive and binding on the parties and no appeal or review will be allowed therefrom.*" [Emphasis added] (XVI C.T. 4994].

Obviously, if appellant is permitted to maintain this appeal, the above-quoted portion of the class notice will have been rendered false.

### C. Proceedings to Approve the Stipulation of Settlement.

#### (1) The Representations of Appellant's Counsel.

On September 8, 1971, after the Stipulation of Settlement had been submitted to the Court for its approval, Northern Acceptance Trust 1065 moved to strike the Stipulation of Settlement [XV C.T. 4905]. On September 15, 1971, the Dilworth firm, on behalf of plaintiff and appellant Brinkerhoff, filed a Memorandum in Support of Submitting the Proposed Stipulation of Settlement to the Court and to the Classes and in Opposition to the Motion of Northern Acceptance Trust to Strike [XVI C.T. 5000]. In that Memorandum, appellant characterized the Stipulation of Settlement as follows:

> "The investment banker will file its appraisals with the Court and serve them upon counsel no later than six months after its appointment. Any

> of the parties may then file written comments, which the investment banker may adopt or reject in whole or in part as it may deem advisable. The appraisals thus prepared by the investment banker will be final, conclusive and binding on the parties, *and no appeal or review will lie there from.*" [Emphasis added] [XVI C.T. 5005].

One of the moving forces behind the Stipulation of Settlement, and the drafter thereof for the plaintiffs, was the Dilworth firm. Now, on behalf of the plaintiff classes, that same firm attempts to avoid its specific agreement not to prosecute an appeal from the decision of the appraisers, as approved by the District Court. It has become apparent in this action that counsel for appellant are the protagonists and directing force behind this litigation rather than the nominal appellant. In effect, counsel for appellant have so admitted in their September 15, 1971 Memorandum in Support of the Stipulation of Settlement where they stated:

> "The role of the named plaintiffs as representative parties is passive only. To qualify as an adequate representative under Rule 23(a)4, the representative need only show absence of interests antagonistic to the remainder of the class and claims typical of those of the entire class. The representative party's attorney, however, must be 'qualified, experienced and generally able to conduct the proposed litigation', which is the 'essential concomitant of adequate representation' . . . The importance of the attorney's obligations to the absent class members is reflected in Professor Moore's comment that the absent class members' '*nominal* representative is a self-appointed repre-

> sentative and *their real representative is a lawyer* chosen by the self-appointed representative. . . .' 3 B Moore, Federal Practice, Par. 23.55 at 23-1159 (2d ed. 1969)." [Emphasis in original] [XVI C.T. 5013-5014].

In substance, the position taken by counsel for appellant on September 15, 1971, was that a settlement proposed by them, as attorneys for a class, could be approved by the Court even though Northern Acceptance Trust 1065, the named class-plaintiff, specifically disapproved of that settlement. In this case, said counsel participated in drafting the Stipulation of Settlement, including the provision that the determination of the appraisers would be final, binding and nonappealable and continually argued that position before the Court.

On September 17, 1971, the District Court held a hearing on the fairness, adequacy and reasonableness of the proposed settlement. On the same day, appellant filed an additional Memorandum in Support of Proposed Settlement [XVI C.T. 5138]. Most revealingly, in that Memorandum, appellant stated:

> "The proposed settlement also eliminates the risk to plaintiffs which continuing this litigation would necessarily entail. In the absence of a settlement, expensive and time-consuming appeals on the merits would be inevitable. It is impossible to predict with certainty the ultimate disposition of this case upon appeal. Thus, the members of the classes would face the risks of reversal on liability, on damages or on both. *The proposed settlement provides that the appraisals shall be final, conclusive and binding on the parties, and no appeal or review will lie therefrom.*

> "Hence, the proposed settlement *guarantees* for the classes that which prosecution to final judgment could not, i.e., an *independent* appraisal of the value of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, *and no appeals.*" [Emphasis added] [XVI C.T. 5144-5145].

During oral argument on September 17, 1971 with respect to the fairness and adequacy of the proposed settlement, counsel for appellant, describing the proposed settlement, stated to the District Court:

> "We saw a way here to prevent not only three separate jury trials, but a way to prevent appeal because the settlement which we propose to this Court contemplates that the conclusions of the independent investment banker will be final and binding on all parties." [R.T. 69-70 (September 17, 1971)].

Later during the same hearing, counsel for appellant argued that the proposed settlement should be approved for reasons of economy, stating:

> "In addition, of course, in order to continue through the trials, it would have been necessary to spend a great deal of money for travel expenses and for living expenses and other expenses which obviously are inherrent [sic] in continuing the three jury trials and the appeals which necessarily would have followed." [R.T. 75 (September 17, 1971)].

Again, in arguing that the proposed settlement would save time, counsel for appellant stressed the fact that

there would be no appeal from the independent appraisals, stating:

> "I think that another fact that has to be considered here, Your Honor, is that this is really not only a saving of judicial time, but it's also a saving of time for members of the classes because all of this will be disposed of without the necessity of the long arduous appeals—not only on the question of the amount of damages, but clearly on the issues of law that are involved in this case. As Your Honor knows, the issues of law were very hard fought and we felt that we would definitely face appeals in the event that we had to continue through the end of this litigation." [R.T. 76-77 (September 17, 1971)].

Subsequently, in the same hearing, counsel for appellant noted that the appraisals to be prepared by the investment banker "will be final, conclusive and binding on the parties and no appeal or review will lie from the appraisals." [R.T. 78 (September 17, 1971)].

It is shocking that in attempting to prosecute this appeal, counsel for appellant should now take a position in which they attempt to avoid all of their earlier representations to the Court, the members of the classes and the other parties to this litigation.

**(2) The Opinion and Order Approving the Stipulation of Settlement.**

At the conclusion of the September 17, 1971 hearing, the District Court requested counsel for appellant to prepare a short narrative decision which the Court could use as a draft for its Order. Specifically, the Court said:

> "Now in order that there may be some semblance of coherence, I'm wondering if I'm going

> too far in suggesting or asking or ordering that Mr. Kauffman [counsel for appellant] prepare a short narrative decision along the lines of the rulings I have made *adopting his theories generally set forth in his memoranda* and present it to the other counsel and then I will revise it so that we'll have in one place or other—rather than any long mixed up record of questions and answers and interruptions—a narrative and coherent statement of what the Court has ruled today." [Emphasis added.] [R.T. 108 (September 17, 1971)].

Counsel for appellant did, in fact, prepare such a draft and the final Opinion and Order, filed on November 15, 1971 [XVII C.T. 5290], provides in part (evidently adopting the language suggested by counsel for appellant):

> "By agreeing upon a Court supervised investment banker whose appraisals will be final and binding, the parties have themselves fashioned a fair method for determination of all damages without the necessity of incurring the considerable risks and expenses of three jury trials and the appeals that inevitably would have followed. Thus, the proposed settlement provides plaintiffs with *all damages* to which they would have been entitled had they proceeded to trial, without the wasteful and costly duplication which inheres in adversary proceedings, particularly those involving Hawaii's unique land system. Indeed, the proposed settlement guarantees to plaintiff that which prosecution to final judgment could not, i.e., an independent appraisal of the value of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, and no appeals." [XVII C.T. 5296-5297].

**D. The Motion to Set Aside the Appraisals.**

On September 5, 1972, Eastman Dillon-Union Securities & Co. filed its appraisal, which appraisal concluded that the minority shareholders of the plantations had received more than fair value for their stock [XVIII C.T. 5668-5673]. On November 6, 1972, appellant moved to set aside the appraisal. Appellant's motion stated:

> "AND NOW, this 3rd day of November, 1972, having filed and served their comments upon the appraisals of Eastman Dillon-Union Securities & Co. ('Eastman Dillon') and Gilbert W. Root ('Root'), and the appraisers not yet having corrected their appraisals in accordance with said comments, plaintiffs Dericksen M. Brinkerhoff and the members of the class, by their undersigned counsel, hereby respectfully move this Honorable Court to set aside the appraisals of Eastman Dillon and Root on the grounds that Eastman Dillon and Root have failed to perform their assigned duties as instructed by this Court and that said appraisals are *fraudulent, grossly irregular, fundamentally unfair* and contrary to the settlement of this action approved by this Court on November 15, 1971. . . ." [Emphasis added] [XIX C.T. 5889].*

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*At every available opportunity prior to the hearing before the lower court, particularly during the period prior to the time Judge Pence indicated he would hold a hearing on the question of whether the Appraisers' report should be accepted and approved, counsel for appellants made repeated charges and allegations of fraud. It was largely because of such charges that a hearing was held. When it did take place, however, appellants submitted no evidence of fraud. Appellants had thus bootstrapped their way through the courthouse doors and then promptly

(This footnote is continued on next page)

On November 6, 1972, plaintiff Northern Acceptance Trust, by its counsel, filed a similar motion [XIX C.T. 5912].

All parties filed substantial legal memoranda and, in December 1972, the court heard three days of testimony by the investment banker and the real estate appraiser, most of it the result of cross-examination by appellant's counsel. Thereafter, on March 19, 1973, the District Court filed its Decision on Challenge to the Validity of Eastman Dillon's Appraisals [XX C.T. 6216]. In that decision the Court wrote:

> "The court is satisfied that neither Eastman Dillon nor Root committed any fraud whatsoever in this case. Nor did plaintiffs proffer any evidence of actual fraud in the performance of their duties.
>
> Plaintiffs also urge setting aside the appraisals on a constructive fraud theory. . . . Plaintiffs in effect argue that certain appraisal techniques used as well as some not used by the appraisers resulted in what amounts to false appraisals and thus constitute constructive fraud. . . .
>
> As more fully discussed hereafter, this Court finds that the use or non-use of certain appraisal techniques or methods by Eastman Dillon and Root were matters of professional selection and

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dropped the charge of fraud and charged instead that the appraisers had not followed the court's instructions. By this appeal, appellants seek review of findings which would not have been made absent their fabricated charges of fraud. This is more fully set forth in the letter of October 25, 1972 from E. Gunner Schull, Esq., one of Amfac's counsel to Judge Tavares [XIX C.T. 5866], and in the "Memorandum of Defendant Amfac, Inc. in Support of Its Cross Motion to Vacate Hearing, etc.," particularly pages 3 to 19 thereof [XIX C.T. 6016].

judgment. Therefore, unless plaintiffs were able to show that false representations had been made, that certain techniques and methods were used or not used by the appraisers, would not, per se, constitute or result in constructive fraud. Neither in plaintiffs' memoranda nor at the hearings have they shown any such false representations on the part of either appraiser." [XX C.T. 6219].

In conclusion, the District Court stated:

"This court finds that the appraisers fully and correctly performed their duty as provided by the Settlement Agreement and in accord with Judge Tavares' instructions, and that there was no error in any of the Eastman Dillon Appraisals.

The motion to set aside the appraisal is DENIED, and the appraisals will take effect under the terms of the Settlement Agreement." [XX C.T. 6231].

A judgment, encompassing the substance of the lower court's opinion of March 19, 1973 and submitted by Amfac, was filed on March 23, 1973 [XX C.T. 6238]. That judgment was vacated by order dated March 30, 1973 because it had not been circulated among all counsel for approval, prior to submission to the Court [XX C.T. 6252]. Appellant's only objection to the judgment prepared by counsel for Amfac was directed to Paragraph 3 of that judgment which provided:

"Pursuant to Paragraph No. 7 of the August 2nd, 1971 Stipulation of Settlement and the November 15, 1971, Opinion and Order of U.S. District Judge C. Nils Tavares, in the within proceedings, approving the aforesaid settlement, and

> more particularly as set forth on page 6 of said Opinion and Order, the appraisals are now final, conclusive, and binding on the parties, and no appeal or review will lie therefrom."

After briefing the question as to form of judgment, the matter was submitted without oral argument. On May 2, 1973, the District Court announced its decision in open court, and in part stated:

> "The record indicates that plaintiffs have filed certain memoranda objecting to the defendants' proposed form of judgment. I find that those objections are entirely without merit. The fact that they [plaintiffs] objected to them in the first place, as I read it, *it was in derogation not only of the words and phrases of the agreement to settle this case . . . but now they propose to appeal from the judgment. . . .*
>
> *The position of the plaintiffs that they have right to appeal I feel is not founded in fact or law.* Paragraph 7 of the Stipulation of Settlement clearly states that the appraisals prepared by the investment banker shall be final, conclusive and binding on the parties and no appeal or review therefrom. And in the November 15 opinion and order of Judge Tavares approving that stipulation of settlement provided on Page 6: Absent fraud or collusion, the appraisals prepared by the investment banker will be final, conclusive and binding on the parties and no appeal or view will rely [sic] therefrom." [Emphasis added.] [R.T. 2-3 (May 2, 1973)].

Thereafter, in the course of rendering his opinion, Judge Pence stated:

> "As stated by Judge Tavares, as stated by the parties themselves, this litigation was to come to an end whenever the Court passed upon and found that there was no fraud or collusion and the appraisals were properly made by the appraisers appointed by the Court and made their appraisals. Under the circumstances, very frankly, the position taken by Brinkerhoff and the other plaintiffs here who objected to the judgment so closely borders upon the specious and fictitious and not made in good faith that the Court—I'll change that—the Court would be ready to find that the time and effort which the Court has had to take and given to this case was not called for; that it was—that the objections were not made in good faith and the claim of right to appeal is not being made in good faith, but I do not wish to prolong the litigation unduly myself, so I won't make that finding, and solely for that reason." [R.T. 4-5 (May 2, 1973)].

The Court thereupon reinstated the judgment filed by Amfac on March 23, 1973 as of that date, stating "it was good then and it's good now." [R.T. 9 (May 2, 1973)]. The only purpose served by appellant's objections to the form of the judgment was to delay entry of that judgment from March 23, 1973 until May 2, 1973 and to cause Amfac to incur further attorneys' fees in opposing appellant's objections. Appellant now appeals from that judgment.

## III.
## ARGUMENT.

### A. Appellant Has Waived His Right to Appeal.

This appeal is an arrogant and ill-disguised attempt by appellant and his counsel to vitiate both the letter and intent of the stipulation of settlement in this action and the opinion of the District Court rendered in connection with the judicial approval of that settlement. No tenable argument can be presented in support of this appeal, especially in light of the fact that appellant apparently admits that he cannot appeal from the appraisers' determination of value. The exchange of letters between counsel and the Court below reveals the contrived nature of appellant's assertions [XX C.T. 6299-6312]. The closest that appellee can come to paraphrasing what appellant contends is by quoting from a letter written by the Dilworth firm to the District Court on May 8, 1973 [XX C.T. 6304]. There, the Dilworth firm states:

> "Your Honor recognizes that this litigation could not end until the Court found that the appraisals were properly made by the Court-appointed appraisers. . . . Your Honor notes that you had concluded that the appraisers had each conformed fully and completely with the instructions of Judge Tavares. It is with this conclusion and the Order resulting therefrom that we respectfully disagree and from which, we respectfully submit, we have a right of appeal."

The purpose of appellant's appeal was again set forth in a letter written by the Dilworth firm to the District Court on May 18, 1973 [XX C.T. 6310], where Mr.

Kauffman stated: "We are appealing only from Your Honor's determination that the appraisers complied with the instructions of Judge Tavares and the agreement of settlement." Surprisingly in the very same letter, Mr. Kauffman inconsistently stated: "We seek only to enforce the terms of the settlement agreement, not to deviate therefrom."

This is such patent sophistry that it stretches credulity for appellant to assert the appeal is being prosecuted in good faith. If the determination of value as found by the appraisers is beyond appeal, then the steps taken in reaching such determination similarly must be nonappealable. The Decision of the District Court on March 19, 1973 found only that the appraisers' determination of value was performed in accordance with Judge Tavares' instruction and the value was correct. No portion of that judgment is appealable. The value determined was the ultimate goal of the settlement; everything else was incidental. To argue seriously that one is not questioning the results of an appraisal, but at the same time may seek review of the means used to obtain such results is in flat contradiction to the entire spirit of the Stipulation in this action. On every possible occasion it was emphasized that the appraisals "shall be final and binding and that no appeal shall lie therefrom." There are no words of limitation or qualification in that Stipulation, nor were such words used by appellant's counsel in any of the arguments before the District Court. Nowhere was there a reservation of a right to appeal from the manner in which the appraisers construed their instructions. In fact, had such a reservation of rights been proposed, the settlement would never have been consummated and the Dilworth firm and other counsel

for appellant would not have in their pockets substantial fees and costs in a sum approximating $385,000.00, which they continue to retain while advocating the prosecution of this appeal. One reaches the inescapable conclusion that this appeal is merely another transparent attempt to generate additional fees for appellant and his counsel.

Moreover, this appeal is improper as a matter of law. The Ninth Circuir is no stranger to such groundless appeals and has clearly and emphatically supported the logical rule of law that if parties to an action, based on adequate consideration, have stipulated that no appeal shall be taken, that stipulation will be enforced by the Court and an appeal in contravention thereof will be dismissed. The most succinct statement of this principle appears in *United States Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 Fed. 577, 579-580 (9th Cir. 1909), cert. denied, 215 U.S. 591 (1910), where the Court stated:

> "While in some jurisdictions it has been held that a mere promise or agreement not to prosecute an appeal will not divest an appellate court of its jurisdiction (*Sanders v. White*, 22 Ga. 103; *Fahs et al. v. Darling, et al.*, 82 Ill. 142; *Runnion v. Ramsay*, 93 N.C. 410), the contrary had been held in other jurisdictions; and it seems to be universally held that, where such an agreement is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court, and the appeal, if taken, will be dismissed (*Townsend v. Masterson, etc.*, 15 N.Y. 587; *Cole v. Thayer*, 25 Mich. 212; *Oliver v. Blair* [Cal.] 5 Pac. 917; *Saling v. German Sav-*

*ings Bank* [Com. P1.] 8 N.Y. Supp. 469; *Commonwealth v. Johnson*, 6 Pa. 136; *Wheeler v. Floral M. & M. Co.*, 10 Nev. 200; *Hill v. Hermans*, 59 N.Y. 396; *Mackey, Executor v. Daniel*, 59 Md. 484; *Emerick v. Armstrong et al.*, 1 Ohio 513; *Johnson v. Halley*, 8 Tex. Civ. App. 137, 27 S.W. 750)."

In accord with the foregoing, see also *Loew v. Willacy*, 239 F.2d 179, 179-180 (9th Cir. 1956); *Bell v. United States*, 9 F.2d 820, 821 (9th Cir. 1925).

In *Gramling v. Food Machinery and Chemical Corp.*, 151 F. Supp. 853, 856 (W.D.S.C. 1957) the parties entered into a compromise agreement which provided, among other things, that the plaintiff's damages would be determined by arbitration and that the arbitration award, if signed by at least four arbitrators, would be "binding upon the parties hereto, without any right of appeal from the award." One of the parties moved to set aside the award on the ground that the award was so grossly excessive as to amount to fraud, that the arbitrators violated the provisions of the arbitration agreement and the Court's instructions relative to the measure of damages and, finally, that the award was invalid under the Federal Arbitration Act. The Court denied the motion stating that "a contract not to appeal, if supported by consideration, is binding upon the parties to it. . . . Defendant is bound by its contract to accept the award as final, and not to appeal from it. If either party could now attack the award, that contract would be meaningless."

Appellee respectfully submits that if appellant and his counsel are now permitted to vitiate the settlement agreement in this case by way of this appeal, they

render nugatory more than two years of diligent work on behalf of all counsel, the Court, Court-appointed appraisers and the parties themselves. The settlement agreement and the various orders confirming it were primarily the craftsmanship of counsel for appellant. They should not now be permitted by glib and unsupportable reasoning to attack that very same agreement.

It is settled law that a party cannot appeal from an order or judgment under which he has accepted a benefit. *Wilson v. Pantosote Co.*, 254 F.2d 700, 702 (2d Cir. 1958); *Colquette v. Crossett Lumber Co.*, 149 F.2d 116, 118 (8th Cir. 1945). Similarly, "it is old and established law that one who has secured a judgment cannot retract a condition to which he assented in order to obtain it." *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965). In the instant case, not only has appellant and the classes he purportedly represents benefited from the expense-free reappraisal of their plantation stock, but also, appellant has benefited by the fact that this counsel have been paid (and have retained) substantial attorneys' fees and costs. Significantly, counsel for appellant have not volunteered to return the benefit they obtained under the judgment approving the Stipulation of Settlement, which judgment included, as an integral part thereof, an express provision that the determination of the appraisers would be final and binding and that no appeal would lie therefrom.

Also well established is the legal principle that by consenting to an entry of judgment, a party waives his right to appeal. Here, by stipulation, appellant consented to the entry of a judgment in which he and the classes that he purportedly represents, as well as his counsel, agreed to be bound by the results of a Court-

supervised appraisal. Appellant and his counsel further specifically agreed that there could be no appeal from that appraisal. Appellant now seeks to appeal and at the same time to retain the benefit of the fact that appellee did not appeal from the order certifying the action as a class and derivative action and similarly gave up its right to appeal from the order granting appellant's motion for partial summary judgment. Unquestionably, the District Court considered appellee's waiver of its right to appeal from the order granting summary judgment a waiver of a significant right. In his Opinion and Order finding the Stipulation of Settlement fair, adequate and reasonable, Judge Tavares stated:

> "Although summary judgment was granted to plaintiffs under Section 10(b) of the 1934 Act, the outcome of an appeal on liability is uncertain since Amfac controlled all three plantations and could have consummated the mergers without the vote of a single minority shareholder." [XVII C.T. 5297 (Footnote)].

Additionally, neither appellant nor his counsel complain that they have received and retained substantial attorneys' fees and costs pursuant to the judgment to which they consented. Certainly, even if the judgment did not specifically provide for a waiver of appeal (which it clearly and unequivocally does) such conduct constitutes a waiver of any right to prosecute an appeal. *Stanford v. Utley*, 341 F.2d 265, 271 (8th Cir. 1965); *White & Yarborough v. Dailey*, 228 F.2d 836, 837 (5th Cir. 1955); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379 (7th Cir. 1953).

**B. This Court Has the Power to and It Should Dismiss This Appeal as Frivolous and Not Made in Good Faith.**

It is unquestioned that a Court of Appeals may, in the exercise of its plenary power, dismiss a civil appeal as frivolous. *United States v. Madden,* 352 F.2d 792, 794 (9th Cir. 1965); *Pacific Westbound Conference v. United States,* 332 F.2d 49, 51 fn. 5 (9th Cir. 1964); *Wheeldin v. Wheeler,* 280 F.2d 293, 294 (9th Cir. 1960); *John v. Gibson,* 270 F.2d 36, 39 (9th Cir. 1959), cert. denied 361 U.S. 970 (1960); *Jiminez v. Barber,* 252 F.2d 500, 554 (9th Cir. 1958). See also Rule 38, Federal Rules of Appellate Procedure.

A number of state courts also have specifically held that parties to an action may waive their right to appeal. See, *e.g., C. G. Horman Co. v. Lloyd,* 28 Utah 2d 112, 449 P.2d 124, 126 (1972); *Mellwin Const. Co. v. Selinger,* 128 Colo. 1, 259 P.2d 612, 613-614 (Colo. Sup. Ct. 1953); *Wyrzykowski v. Budds,* 325 Mich. 199, 38 N.W. 2d 313, 315 (1949); *Phelps v. Blome,* 150 Neb. 547, 35 N.W. 2d 93, 95-96 (1948); *Speeth v. Fields,* 47 Ohio L. Abs. 47, 71 N.E. 2d 149, 150 (1946); *Harmina v. Shay,* 101 N.J. Eq. 273, 137 Atl. 558 (1927); *Southern Indiana Power Co. v. Cook,* 182 Ind. 505, 107 N.E. 12, 14 (1914); *Hoste v. Dalton,* 137 Mich. 522, 100 N.W. 750, 751-752 (1904).

Of particular pertinence is the statement of the Supreme Court of Indiana in *Southern Indiana Power Co. v. Cook, supra:*

> "Now in the case before us the essence of the agreement was that the appraisers agreed upon by the parties and appointed by the court should

fix the amount that appellant should pay to appellee Cook for lands of his which it had taken and subjected to a use from which such land could not be released, and that the amount fixed should be final and binding on both parties as the measure of appellee's damages. The judgment was proper, and the agreement is amply broad and comprehensive enough to cover it. It was evidently the intention of the parties to settle the right of appellant in the lands of appellee and the compensation of the latter therefor finally in the lower court.

"The rule which obtains in a majority of jurisdictions is that a stipulation waiving the right to appeal is valid and binding and bars an appeal taken in violation of its terms. An objection to the appeal may properly be taken in the appellate court by a motion to dismiss based on the agreement."

The language and intent of the Stipulation of Settlement, the statements of appellant's counsel with respect thereto, and Judge Tavares' opinion approving the settlement and apointing the appraisers, are clear. Appellee waived its rights to appeal from the orders holding the action maintainable as a class action and granting summary judgment on the issue of liability. Appellee paid $385,000.00 to plaintiff's counsel, which has been retained. *All* parties agreed that none would have a right to appeal from the determination of the appraisers. Appellant's claim that this appeal is not really from the findings of the appraisers as to value but rather from the judgment of the District Court that the appraisers properly adhered to the instructions of

the Court in performing the duties imposed upon them by the settlement is pure sophistry and not made in good faith. One has only to refer to the statement of Judge Pence, made on May 2, 1973 at the time of the entry of the judgment from which this appeal purports to be taken that appellant's "right to appeal . . . is not founded in fact or law" to establish the lack of *bona fides.*

**C. Appellee Is Entitled to Recover Just Damages, Including Attorneys' Fees and Double Costs, Incurred With Respect to This Appeal.**

Rule 38 of the Federal Rules of Appellate Procedure provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Similarly, 28 U.S.C. § 1912 provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The Advisory Committee's note to Rule 38 of the Federal Rules of Appellate Procedure states:

> "Compare 28 U.S.C. §1912. While both the statute and the usual rule on the subject by courts of appeal . . . speak of 'damages for delay,' the courts of appeals quite properly allow damages, ed by the court in its discretion in the case of a appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. . . . The subjects of interest and damages are separately regulated, contrary to the present prac-

> tice of combining the two . . . to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as penalty against the appellant."

No court should be compelled to tolerate a frivolous appeal. In order to discourage such appeals, courts have been empowered to impose severe sanctions against parties who insist on prosecuting an unsubstantial appeal. The United States Supreme Court has stated that "where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed." *Slaker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 159, 73 L.Ed. 258 (1929); *Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 160-161, 73 L.Ed. 261 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 233-234, 43 S.Ct. 589, 592, 67 L.Ed. 961 (1923); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109, 33 S.Ct. 80, 83, 57 L.Ed. 140 (1912).

Reported cases from nearly every Circuit hold that an appellate court has the power (if not the duty) to award damages, attorneys' fees and multiple costs to an appellee upon dismissing a frivolous appeal. The most recent statement of this principle, which emphasizes the fact that frivolous appeals add needless volume to the already heavy volume of business of appellate courts is *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972):

> "[W]e deem Furbee's appeal from the order of dismissal to be, in the circumstances, utterly without merit and frivolous. The federal case law sup-

porting Vantage Press is unambiguous and unwavering [sic]. Appellant was made fully aware of the cases Appellee chiefly relied on in a memorandum in support of defendant's motion to dismiss, filed with the District Court and reprinted in Appellant's Brief. We find nothing in Appellant's argument on appeal which casts the remotest doubt on those cases. Notwithstanding the clear state of the law, Furbee pressed his appeal, involving Vantage Press in the inconvenience and expense of employing counsel to resist the appeal. Appellate Courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. Justice we think, requires that the costs of this appeal, including the expenses of printing Appellee's brief, and reimbursement for reasonable attorney's fees be awarded to Vantage Press."

In *Lowe v. Willacy*, 239 F.2d 179, 180 (9th Cir. 1956), this Court awarded damages, attorneys' fees and double costs to an appellee who was compelled to participate in a frivolous appeal. In doing so, the Court stated:

"Since appellant by her own act has forced appellee to consider her brief and thereby necessarily to write his opposing brief, in affirming we adjudge to appellee just damages for his delay, 28 U.S.C. § 1912, of double his costs and an amount equal to the fee paid his attorney for his services in the appeal and the amount paid for the printing of his brief, the two latter amounts to be shown by appellee's affidavit filed with the Clerk of this Court."

On a similar note, the First Circuit stated in *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64, 67-68 (1st Cir. 1959):

> "We think that this appeal is obviously frivolous and vexatious. Also, we do not like some of the tricks of advocacy indulged by counsel for appellant to lend apparent substance to its position. . . . For these reasons, pursuant to the discretion vested in us by 28 U.S.C. §1912, we shall award double costs to the appellee herein."

Other cases in which damages, attorneys' fees or costs have been awarded for frivolous appeals are legion. For example, see *Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970); *Layton v. Selb Manufacturing Co.*, 359 F.2d 715, 717 (8th Cir. 1966), cert. denied 385 U.S. 929 (1966); *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir. 1965), cert. denied 382 U.S. 814 (1965); *A/S Krediit Pank v. Chase Manhattan Bank*, 303 F.2d 648, 649 (2d Cir. 1962); *Ginsberg v. Stern*, 295 F.2d 698 (3d Cir. 1961), cert. denied 368 U.S. 987 (1962); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th Cir. 1949); *In re Midland United Co.*, 141 F.2d 692 (3d Cir. 1944); *Fern Gold Mining Co. v. Murphy*, 7 F.2d 613, 614 (9th Cir. 1925).

Appellee respectfully submits it is beyond dispute that this apeal is unsubstantial, unjustified, unnecessary and frivolous in the full meaning of these words. As was true in *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., supra*, only "tricks of advocacy indulged in by counsel for appellant lend any vestige of substance to this appeal." Appellant expressly waived

his right to appeal. Even if he had not expressly waived that right, his conduct in stipulating to a settlement under which he and his counsel accepted and retained substantial benefits and under which stipulation appellee suffered substantial detriment by waiving its right to appeal, clearly estops appellant from prosecuting this appeal.

We suggest, moreover, that the underlying cause of this improperly taken appeal in contravention of a binding stipulation cannot be attributed only to overzealous advocacy, but is motivated by the desire of plaintiff's counsel to invoke the provisions of Paragraph 13 of the Stipulation.*

Appellee seeks leave to submit at the appropriate time, by affidavit or testimony, evidence of the direct and indirect damage it has suffered by reason of this unwarranted appeal, which evidence, of course, will include such items as attorneys' fees and printing costs. See *Lowe v. Willacy*, 239 F.2d 179, 180 (9th Cir. 1956).

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*Paragraph 13 of the August 2, 1971, Stipulation of Settlement, approved by the November 15, 1971, Opinion and Order [XVII C.T. 5290], reads as follows:

> "13. Amfac and the above-named defendants and their counsel agree that the payment of the amount set forth in paragraph 12 hereof will not bar an application by plaintiff's counsel to the Court for an allowance of attorneys' fees, costs and out-of-pocket disbursements from any fund which might be created for the benefit of the plaintiffs and the classes they represent as the result of the original appraisals. Amfac and the above-named defendants and their counsel stipulate that they will make no objection to an application for such an allowance which does not exceed twenty percent (20%) of such fund." [XV CT 4804-4805].

## IV.

## CONCLUSION.

Amfac, Inc., is a public corporation whose stock is traded on the New York Stock Exchange and other leading exchanges. As such, it must comply with the rules and regulations of those exchanges and of the Securities and Exchange Commission which require it to disclose periodically to its shareholders, and to the Commission itself, the existence of pending litigation. The pendency of this appeal, therefore, even if it is frivolous and unwarranted, will have to be reported—resulting in undue unfavorable publicity which naturally prejudices the investment value of any security.

Appellee, Amfac, Inc., respectfully submits that there is no justification in law or in fact for this appeal, and that it should be dismissed forthwith as frivolous. Appellee also requests that it be awarded its direct and indirect damages, including attorneys' fees and double costs, incurred by reason of this appeal, and such sanctions as the Court may find to be warranted.

Respectfully submitted,

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